Supreme Court, U.S.
FILED
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No. ____

In the Supreme Court of the United States

ANDREW MESSINA, JR.
AND D&G PRODUCTIONS, INC.
Petitioners,

v.

THE PARISH OF ST. CHARLES,
THE ST. CHARLES PARISH COUNCIL,
GREG CHAMPAGNE, IN HIS CAPACITY AS THE
SHERIFF & EX-OFFICIO TAX COLLECTOR
FOR THE PARISH OF ST. CHARLES,
AND DEPUTY PAM SCHMITT
Respondents,

On Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana to Review the Decision of the Louisiana Fifth Circuit Court of Appeal Affirming the Grant of Summary Judgment by the 29th Judicial District Court Parish of St. Charles

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Louisiana appellate court err by failing to render a full opinion that addressed the dispositive issues in this case?

2. Did the Louisiana appellate court err by not finding a genuine issue of material fact as to whether the actions of Respondents constituted a violation of the Petitioners' rights to freedom of expression?

3. Did the Louisiana appellate court err by not finding a genuine issue of material fact as to whether the actions of Respondents constituted a taking and a violation of the Petitioners' substantive due process rights?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. D&G Productions, Inc. is a Louisiana corporation which is not publicly held. No publicly held company owns ten percent or more of D&G Productions, Inc.

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OPINIONS BELOW

The March 26, 2004 opinion of the Supreme Court for the State of Louisiana denying Certiorari. Appendix 22a. The December 30, 2003 opinion of the Fifth Circuit Court of Appeal for the State of Louisiana. Appendix 8a. The Reasons for Judgment issued by the 29th Judicial Court for the Parish of St. Charles. Appendix 1a.

STATEMENT OF JURISDICTION

The Supreme Court for the State of Louisiana issued its opinion on March 26, 2004. This petition for certiorari is timely in that Petitioners have filed it within 90 days of March 26, 2004. The Court has jurisdiction pursuant to 28 U.S.C.A. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the First, Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

I. Overview of the Case

On February 10, 2003, the 29th Judicial District Court for the Parish of St. Charles granted the Parish's Motion for Summary Judgment. On March 19, 2003, the 29th Judicial District Court for the Parish of St. Charles issued Reasons for Judgment. Appendix 1a. On December 30, 2003, the Louisiana Fifth Circuit Court of Appeal affirmed. Appendix 8a. On March 26, 2004 the Supreme Court of the State of Louisiana denied application for writ of certiorari and/or review. Appendix 22a.

II. Background of the Case

The Petitioners are Andrew Messina, Jr. and a company of which he is the president and sole shareholder, D&G Productions, Inc. ("D&G"). In 1994, D&G leased a tract of land located in St. Charles Parish, from which D&G operated Messina's Oaks Plantation. Messina's Oaks Plantation was a reception hall for weddings and other gatherings.

In each year from 1994 through 1997, the D&G applied for and obtained a class A "restaurant" alcohol permit for the operations of Messina's Oak Plantation. These permits were in effect from January 1 to December 31 of each respective year.

At all times relevant to these proceedings, it was illegal for businesses to allow their patrons to consume alcoholic beverages in the outdoor area of the business' premises. However, in each year that D&G obtained its "restaurant" alcohol permit until August 5, 1997, restaurants in St. Charles Parish were automatically exempt from this prohibition.

As part of its facilities, Messina's Oaks Plantation employed a large tent for its outdoor receptions. Through December 31, 1997, D&G entered into several contracts with brides to hold receptions at Messina's Oak Plantation. In these contracts, D&G agreed to accommodate large numbers of guests. The large number of guests prevented the receptions from being held entirely inside of the premises. By virtue of the contracts with the brides, D&G had to allow its patrons to consume alcohol in the outdoor areas of the premises. Prior to August 5, 1997, D&G could do this by the rights bestowed by its "restaurant" alcohol permit.

At some time during 1997, neighborhood residents complained to officials of the Respondents, St. Charles Parish, about the noise emanating from Messina's Oaks Plantation. In response, on August 5, 1997, while D&G's permit was still in effect, the Defendants-Respondent passed ordinance No. 97-81 ("Ordinance"), which required restaurants to apply for and receive an additional permit before the restaurants could allow their patrons to consume alcohol in outdoor areas of the premises. This Ordinance went into effect immediately.

At the August 5, 1997-council meeting, the Parish attorney introduced the Ordinance. He stated that there was a noise problem with Messina's Oak Plantation that the council should address. He also stated that ordinances regulating noise would be difficult to be found constitutional and to enforce. In order to "get around" these problems, he recommended the passage of the Ordinance to force Messina's Oak Plantation to discontinue creating noise. Several council members and a few others spoke at the meeting. The only thing mentioned, whatsoever, as a grounds to enact the Ordinance was to deal with the noise.

After the passage of the Ordinance, but again prior to the expiration of D&G's "restaurant" alcohol permit, the Ordinance was enforced and caused D&G to breach many of the contracts with the brides. The Petitioners applied for the permit created by the Ordinance, which was, of course, denied. The actions of the Respondents caused D&G to breach numerous contracts, have numerous lawsuits filed against them seeking damages for those breaches and further caused D&G to lose hundreds of thousands of dollars in gross revenues. With such catastrophic losses caused by the Respondents' arbitrary and unconstitutional actions, Messina's was unable to continue as an on-going business concern.

The Petitioners filed suit alleging numerous violations of the Constitution. The trial court granted summary judgment in favor of the Respondents and an appeal followed.

Despite voluminous argument that the Respondents used the Ordinance as an unconstitutional pretext to illegally regulate noise, the Fifth Circuit affirmed the grant of summary judgment without discussing this argument whatsoever in its opinion. The Louisiana Supreme Court denied Petitioners' writ of certiorari. The Petitioners are seeking a review of the Louisiana appellate court's affirmation.

III. Proceedings Below

The Louisiana Fifth Circuit affirmed the trial judge's granting of Respondent's Motion for Summary Judgment. Both the Louisiana Fifth Circuit's affirmation and the trial judge's ruling directly conflict with this Honorable Court's decision in Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). In Newport, the First Circuit held and this Court affirmed that municipalities were prohibited from using mere "pretexts" to abridge individual freedoms of expression. The Louisiana Fifth Circuit affirmed a parishes' use of an alcohol regulation as a pretext to curtail noise. Petitioners have argued and maintain that such a pretext is a direct violation of they important Newport holding.

REASONS FOR GRANTING THE PETITION

Several factors are present that warrant the jurisdiction of this Court. First, the Louisiana Fifth Circuit did not even bother to address Petitioners' pretext argument in its opinion. The secretive manner in which the Louisiana appellate court rendered its decision is in direct violation of

the performance standards set forth by the Louisiana State Supreme Court, as well as sound appellate practices. This is a compelling reason to grant the writ.

Second, the ignored pretext argument deals with constitutional issues and the Louisiana Fifth Circuit's incorrect holding must stem from the lower court's mis-application of the United States and Louisiana Constitutions. This mis-application will cause a material injustice to the Petitioners as their entire business and livelihood has been destroyed.

Moreover, there is great pubic interest in the pretext issue. The Louisiana Fifth Circuit's ruling permits the Respondents to "work around" the strict standards that the United States Supreme Court requires for the regulation of noise. This incorrect application of the Constitution disturbs the balance of power that is critical to our system of government. The public has a great interest in our system of government. A writ should be granted to address this important issue.

Third, the Louisiana Fifth Circuit mis-applied the Constitution when it spoke on the takings and substantive due process claims. The lower court did not recognize that the Respondents simply took away the rights that they had previously sold to the Petitioners. This miscarriage of justice is material.

Additionally, the public, particularly business owners, have a compelling interest in the outcome of this

case. If governmental entities are allowed to take away the rights bestowed by licenses arbitrarily, then the licenses mean nothing. Every business owner who has a license from any governmental entity has an interest in this case. This is substantial issue that should be addressed by this Court.

Accordingly, this Court should grant the requested writ.

I. Review Is Warranted Because the Appellate Court Erred by Failing to Render a Full Opinion That Addressed the Dispositive Issues in this Case.

Exercising this Court's jurisdiction is appropriate because the Louisiana Fifth Circuit grossly departed from proper judicial proceedings by failing to address the dispositive issues in this case. See La. St. S.Ct. R. 10§1(a)(5).

The Louisiana Supreme Court commands the following to its appellate courts:

> Performance Standard 2.2--Clarity of Decisions
>
> Louisiana court of appeal decisions should be clear and **full opinions should address the dispositive issues**, state the

> holding, and **articulate the reasons** for the decision in each case.

La. St. S.Ct. Gen. Admin. R. Part G§10. (Emphasis supplied).

Whether the actions of the Respondents were merely a pretext to violate the Petitioners' right to freedom of expression is a dispositive issue in this case. The Petitioners' original appellate brief assigned seven errors to the trial court, several of which related to the pretext issue. The bulk of the Petitioners' argument in their original brief, reply brief, and oral argument was directed to the pretext issue.

Despite the emphasis on this issue, the Louisiana Fifth Circuit completely skipped any discussion whatsoever on the pretext argument. The appellate court did not address this dispositive issue and it did not articulate reasons for its decision to apparently disagree with the pretext argument and the Newport case discussed at length below. The Louisiana Fifth Circuit's violation of Performance Standard 2.2 is a direct departure from the proper judicial proceedings as set forth by the Louisiana Supreme Court, as well as accepted appellate practices.

II. Review Is Warranted Because the Appellate Court Erred by Not Finding a Genuine Issue of Material Fact as to Whether the Actions of Respondents Constituted a Violation of the Petitioners' Rights to Freedom of Expression.

The appellate court's muteness on its disagreement with the pretext argument may be explained by the argument's correctness. Summary judgment should not be granted when a genuine issue of fact exists. La. Code Civ. Proc. Art. 966(1). An issue of fact exists as to whether the Respondents enacted the Ordinance as a pretext to illegally regulate noise.

This Honorable Court has decreed that any regulation of noise is subject to strict scrutiny. Saia v. New York, 334 U.S. 558 (1948); Polaris Amphitheater Concerts, Inc. v. City of Westerville, 267 F.3d 503 (6th Cir. 2001). Ordinances regulating noise generally require specific measurements of sound, measured from a specific locations, at specific times. Not regulating noise using this method, or another method that is narrowly tailored to the interest of preventing noise, is a violation of the First Amendment and is impermissible. It is unlawful for governmental entities to do something that is impermissible, under the pretext of doing something that is permissible. Newport v. Fact Concerts, Inc., 626 F.2d 1060 (1st Cir. 1980), *rev'd on other grounds*, 453 U.S. 247 (1981).

The record is replete with evidence showing that the Respondents used alcohol regulation as a pretext to regulate noise. When the Parish attorney introduced the Ordinance at the council meeting, he flatly admitted that this ordinance was to "get around" the Supreme Court's requirements for noise regulations. All of the commentary from everyone who spoke at this meeting addressed noise and no other concerns were ever mentioned. In fact, there is no evidence showing that Ordinance was created for anything else besides noise. Thus, summary judgment for the Defendant-Respondents was wrong.

This error is a compelling reason for this Court to exercise its jurisdiction. First, the ultimate holding, although it is not supported by any language in the opinion, is in conflict with a decision of this Honorable Court. Second, the holding stems from an erroneous interpretation or application of the constitution of the United States. Saia, *infra*.

Furthermore, the decision will cause material injustice and significantly affect the public interest. La. St. S.Ct. R. 10§1(a)(4). The decision will cause material injustice because it approves the Respondents' wrongful actions that completely destroyed the Petitioners reputation and livelihood. Leaving the Petitioners with no remedy is materially unjust.

The public interest is significantly affected because the holding tells municipalities that it is okay to "work around" the law as set forth by the judiciary. Sanctioning

this behavior compromises the separation of powers that is the cornerstone of our system of government. This case is worthy of this Honorable Court's consideration.

III. Review Is Warranted Because the Appellate Court Erred by Not Finding a Genuine Issue of Material Fact as to Whether the Actions of Respondents Constituted a Taking and a Violation of the Petitioners' Substantive Due Process Rights.

Although it was discussed, the Louisiana Fifth Circuit's erroneous decision on the substantive due process claim is also in conflict with prior decisions of the Louisiana Supreme Court and it is an erroneous application of the constitution of the United States. La. St. S.Ct. R. 10§1(a)(1) and (4).

Petitioners agree that there is no fundamental right to sell alcohol or to allow the patrons of your business consume alcohol in the outdoor areas of your premises. However, once a municipality sells these rights by issuing a permit, the rights granted under the permit become property rights, which are fundamental. See Paillott v. Wooton, 559 So.2d 758 (La. 1990); Reynolds v. Louisiana Board of Alcoholic Beverage Control, 248 La. 639, 181 So.2d 377 (La. 1965); and Nomey v. State of Louisiana, 315 So.2d 709 (La. 1975). A municipality cannot arbitrarily take away any fundamental rights, including those granted

by a permit. Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981).

The evidence in the case shows that this is exactly what the Respondents did to the Petitioners. Evidence supports the following facts:

1. That D&G paid for a valid class A "restaurant" alcohol permit that was in effect from January 1, 1997 to December 31, 1997;

2. That this permit gave D&G the right to sell alcoholic beverages;

3. That, prior to the enactment of the ordinance at issue herein, only "restaurants" could permit there patrons to consume alcoholic beverages in the outdoor areas of the premises;

4. That, prior to the enactment of the ordinance, the "restaurant" permit, gave D&G the right to allow its patrons to consume alcoholic beverages in the outdoor areas of its premises;

5. That, before the expiration of the permit on December 31, 1997, the ordinance took away D&G's right to allow its patrons to consume alcoholic beverages in the outdoor areas of its premises;

6. That being unable to allow its patrons to consume alcoholic beverages in the outdoor areas of the premises caused D&G to breach numerous contracts; and

7. That because of having to breach these numerous contracts, D&G had to cease operations and caused the Petitioners to incur the other damages at issue herein.

The above facts demonstrate that D&G acquired a valid property right to allow its patrons to consume alcohol in the outdoor areas of its premises until December 31, 1997 and that the Ordinance arbitrarily took away this right. The Respondents actions were an unconstitutional taking and a violation of the Plaintiff-Applicants' substantive due process rights. Summary judgment was not appropriate on these claims.

The Louisiana Fifth Circuit's decision conflicts with the decisions of this and other courts, which in and of itself provides a reason to grant the writ. More importantly, the lower court's mis-application of the United States Constitution creates a material injustice and significantly affects the public interest.

First, it is materially unjust to destroy the Petitioners' business when they did nothing illegal. The Petitioners opened a business in conformity with the laws that existed. They got every license that the Petitioners needed to operate their business. The Petitioners invested

money into the business with the expectation that the licenses that they acquired would allow them to conduct business as long as the licenses were in effect. Suddenly and arbitrarily, the Respondents changed the rules and made it impossible for the Petitioners to do business. It shocks the conscience to think that this could happen. A material injustice has occurred.

Second, the mis-application of the Constitution significantly affects the public interest. It is in the public's interest that businesses know that they can rely upon the permits and licenses that governments sell. The Respondents "working around" our Constitution materially affects all businesses. The Louisiana Fifth Circuit's decision condoning such behavior erodes the public's faith in the government. The public's interest in the outcome of this case is high. This case is worthy of the Court's consideration.

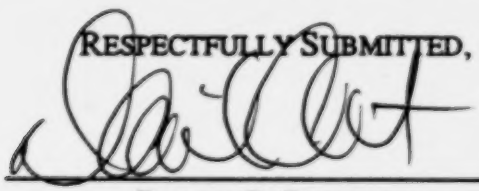
CONCLUSION

The Louisiana Fifth Circuit's silence on a central issue in this case in and of itself should be grounds to grant the requested writ. The lower court failed at its most basic job, that of writing opinions. The muteness on the pretext issue is poignant because it seems as though the appellate court did exactly what the Respondents did: they attempted to hide their incorrect actions. This is a very compelling reason for this Court to grant the writ.

The pretext issue and the takings and substantive due process issues are of great importance to the public. They deal with the government's relationship with itself and with individuals. This Court in the Newport case has already sent the message that municipalities should not employ pretexts to violate our Constitution. This Honorable Court's intercession is once again needed. These issues are worthy of this Honorable Court's consideration.

For these reasons, the Petitioners respectfully request that this Honorable Court GRANT the writ of *certiorari*.

RESPECTFULLY SUBMITTED,



DAVID C. CLEMENT

June 23, 2004

TWENTY-NINTH JUDICIAL DISTRICT COURT

IN THE PARISH OF ST. CHARLES

STATE OF LOUISIANA

ANDREW G. MESSINA, JR., ET AL.
VERSUS
THE PARISH OF ST. CHARLES, ET AL.

NO. 50,029
DIVISION
"D"

THE HONORABLE KIRK R. GRANIER
JUDGE

Transcript of the Proceedings
Taken in Open Court at Hahnville, Louisiana on
March 19, 20003

REASONS FOR JUDGMENT

REPRESENTING THE PLAINTIFF:

REPRESENTING THE DEFENDANT:

PREPARED BY: NANCY FREMEN, CCR
Official Court Reporter

REASONS FOR GRANT OF SUMMARY JUDGMENT IN FAVOR OF ST. CHARLES PARISH

FACTUAL BACKGROUND

Plaintiff, D. & G Productions, Inc., filed this lawsuit against the defendant, St. Charles Parish, requesting damages for the denial of a permit to serve alcohol beverages outdoors near its leased restaurant and wedding reception hall facilities. Plaintiff claims violation of his constitutional rights under Equal Protection, Due Process and taking provisions of the united States and Louisiana Constitutions.

In April, 1994 plaintiff D & G Productions, Inc. whose sole share holder was the plaintiff, Andrew Messina Jr., leased a building in Destrehan, Louisiana located at 20 Avenue of the Oaks for the purpose of operating a restaurant and wedding reception hall (Messina's Oak Plantation). In the following three years plaintiff's business increases to the point that D&G Productions, Inc. booked wedding receptions almost every weekend. The wedding reception building is approximately three thousand to four thousand square feet. The maximum indoor facility capacity was seventy-five people. Attendance surpassed this seventy-five person capacity limit and plaintiff according extended its hosting services to an outdoor tent. Plaintiff served alcoholic beverages both inside the reception hall and outside both in and around the tent facility. The outdoor facility was larger and sometimes drew crows approaching 250 people.

In 1997 plaintiff began receiving complaints from nearby neighbors regarding the noise from his outdoor wedding receptions. Plaintiff unsuccessfully attempted to resolve these complaints. Around this time the St. Charles Parish council was considering regulation of outdoor alcoholic beverage service by restaurants located near residential neighborhoods. As a result, the St. Charles Parish Council passed ordinance No. 97-8-1 on August 5, 1997 which amended section 3-6 by eliminating existing exemptions for restaurants from regulations governing permitted outdoor areas where alcoholic beverages could be consumed. Specifically, ordinance No. 97-8-1 provided that negative impacts to adjoining residential areas at local restaurants prompted a need to revise the specific restaurant exemption from the ordinance. The amendment required the proprietor of an outdoor area surrounding a barroom or restaurant where alcoholic beverages were served and consume to file an application for that specific type of use with the director of the planning and zoning department for St. Charles Parish. The Planning and Zoning Department would then post the applicants property with the notice of the permit request for the required five day period. The director would then approve the application if he received no negative commentary on the permit application from any property owner within five hundred feet of the applicant's property. If, however, the director received any negative commentary from eligible property owners the permit application was then forwarded to the council secretary for consideration by the St. Charles Parish Council. In addition, if the planning and zoning director disapproved the application even though he received no negative comment,

the applicant would then be able to appeal the negative decision to the St. Charles Parish Council.

Plaintiff in this case submitted his application for an outdoor permit, pursuant to this ordinance, on December 9, 1997. The Department of Planning and Zoning posted the proper notice and afterwards received four objections to the issuance of permits by four property owners within the designated distance from plaintiffs business. As result, the St. Charles Parish Council tabled plaintiffs permit application on January 5, 1998. On February 2, 1998 it denied the permit application submitted by plaintiff.

LAW AND REASONS FOR JUDGMENT

The Court shall render a summary judgment when there is no genuine issue of material fact and mover is entitled to judgment as a matter of law. This now favored procedure is designed to secure the just, speeding and inexpensive determination of actions. The Court should grant a motion for summary judgment against the adverse party who fails to make a showing sufficient to establish the existence of proof of an element essential to its claims on which he bares the burden of proof at trial.

Ordinance No. 97-8-1 was a legislative action enacted by the St. Charles Parish Council. Ordinarily these actions do not lend themselves to procedural due process claims. In *South Gwent v. Prat*, 491 F.2d 5, The United States Fifth Circuit Court of Appeal held that zoning ordinances enacted by a city council were characterized as

legislative or quasi-legislative, thereby negating procedural due process claims. Accordingly, a property owner must show a vested right established by law, a denial of that right without adequate notice and hearing before a procedural due process violation and claim can be assertive. Here, the plaintiff does not have a vested right to sell alcoholic beverages. The state, pursuant to its police power, may regulate and control the sale of alcoholic beverages in order to control the negative effects and consequences of its consumption. See *Acy v. Allen Parish Police Jury*, 520 So.2d 866 (La. App. 3rd Cir. 1987).

Regarding plaintiffs substantive due process claim. In the exercise of its police powers and zoning decision, the state must have a rational basis for regulating private behavior on private property. See *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986). There is no genuine issue of fact in the case at bar that the ordinance at issue was rationally related to a legitimate government interest, i.e. the regulation of alcoholic beverage consumption outdoors near residential neighborhoods. Plaintiff's deposition established that he received repeated complaints of noise from patrons at his outdoor reception tent. The noise, undoubtedly, increased wit the increase of alcohol consumption by patrons. St. Charles Parish Council had a legitimate interest in preserving the integrity of the residential neighborhood adjacent to plaintiffs business and, with good reason, passed an ordinance that limited the outdoor sale and consumption of alcohol in the parish. There is no genuine issue of fact that this zoning ordinance bares a substantial relationship to the public health, safety and general welfare of the

residential neighborhood here and was in furtherance of a legitimate governmental interest. Even assuming the ordinance was past directly as a result of the noise problems at plaintiffs business location, the ordinance past by the St. Charles Parish Council was constitutionally acceptable. In *Cannon v. Richland Parish Police Jury*, 388 So.2d 1188 (La. App. 2d Cir. 1976), the court held that the parish police jury had expressed statutory authority and sound discretion to amend a prior ordinance to prohibit the sale of beer within three hundred feet of a church even though the amendment occurred shortly after the plaintiff filed its application for a alcohol permit.

Regarding plaintiffs Equal Protection claim. The plaintiff is not a member of a suspect class and therefore the equal protection clause requires only a minimum degree of rationality. The St. Charles Parish Councils ordinance and its denial of plaintiff's permit application requires only a arguably rational relationship to a conceivably legitimate governmental goal. There is no genuine issue of fact here. This ordinance is rationally related to the legitimate governmental objective of controlling and curtailing alcohol consumption based noise near residential areas.

Finally, regarding plaintiff's taking claim. This ordinance did not sufficiently intrude upon plaintiffs economically viable use of the its leased property to constitute a taking of property requiring compensation . The fifth amendment prohibition against the taking of property without compensation does not guarantee the most profitable use of that property, see *Jackson Court*

Condominiums, Inc. v. City of New Orleans 874 So.2d 1070 (5th Cir. 1989). Clearly, the plaintiff's business did not close as a result of this ordinance. Plaintiff was still allowed to sell alcoholic beverages inside his facility and to continue the outdoor receptions as long as alcohol was not consumed or sold outside the facility.

For these reasons the motion for summary judgment filed by the defendant, St. Charles Parish is granted. Plaintiffs lawsuit is dismissed with prejudice.

* * * * * * * * *

C-E-R-T-I-F-I-C-A-T-E

I, Nancy Freman, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings taken on March 19, 2003, held in the matter of **ANDREW G. MESSINA, JR., ET AL VERSUS THE PARISH OF ST. CHARLES, ET AL., NUMBER: 50,029**; to the best of my ability and understanding.

s/Nancy Freman
Nancy Freman, CCR
Official Court Reporter
In and for the 29th Judicial District

ANDREW MESSINA, JR.	NO. 03-CA-644
VERSUS	FIFTH CIRCUIT
ST. CHARLES PARISH COUNCIL	COURT OF APPEAL
	STATE OF LOUISIANA

ON APPEAL FROM THE 29TH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 50,029, DIVISION "D"
HONORABLE KIRK R. GRANIER, JUDGE PRESIDING

DECEMBER 30, 2003
JAMES L. CANNELLA
JUDGE

Panel composed of Judges Sol Gothard,
James L. Cannella and Clarence E. McManus

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AFFIRMED

This is an appeal by the Plaintiffs, Andrew Messina, Jr. (Messina) and D&G Productions, Inc. (D&G), from a summary judgment denying an outdoor liquor permit by the Defendant, the Parish of St. Charles (the Parish). We affirm.

In April of 1994, D&G, through its President and owner, Messina, leased a building at 20 Avenue of the Oaks, Destrehan, Louisiana for the purpose of operating a wedding reception hall and restaurant. The building is 3,000-4,000 square feet, with a maximum capacity of 75 people and is located within 500 feet of a residential neighborhood. The Plaintiffs operated the business in the name of Messina's Oak Plantation (Messina's) for three years. The reception business steadily grew and the booking increased to multiple events on the weekends and large parties. To accommodate the larger parties, the Plaintiffs erected a large tent outside the building to accommodate up to 250 people. Liquor was served outdoors and musicians played in an outside tent. In 1996, Huey Long (Long), a neighbor, complained of noise from a diesel operated truck which was hired to provide air-conditioning to the outside tends. The Plaintiffs subsequently purchased air-condition units to replace th truck. However, as the events and the number of guests increased, the noise from outside music increased. Long and other residents of the area nearby complained. Messina usually stopped the music if it was after 10:00 p.m. Eventually, the residents located near the facility signed a petition for the Parish to take some action to curtail the noise from the music.

The issues was considered by the Parish counsel on August 5, 1997 in a public hearing. A recommendation was made to amend the Code of Ordinances, Section 3-6, which regulates the permitting process for the sale and consumption of alcoholic beverages outdoors. At the time, the ordinance exempted restaurants from its provision. The amendment would remove the exemption and provide for a procedure to appeal to the council if a permit application was denied. Several resident near the Plaintiffs' business poke in favor of the ordinance, contending that the noise and vibrations emanating from the bands playing for the outside wedding receptions was so bad that it seriously impeded conversations and shook the houses. During the discussion, it was noted that alcohol consumption causes raised voices, causing the music in turn to be played louder. Thus, regulation of the sales and consumption of alcoholic beverages would be a way to control the noise. The Parish council members acknowledged that a specific noise ordinance was moor difficult to draft because of freedom of speech and law enforcement concerns.

Following the meeting, the Parish council passed an amended ordinance which required the Plaintiffs to apply to the Director of Planning and Zoning for a non-fee, one-time permit.[1] The Plaintiffs continued to operate the business for

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[1] After the application is received, the Director posts the notice of the application for 5 days. If no negative commentary is received, the permit may be granted. If there is negative commentary, or the Director denies the application without negative comm[illegible], the application is forwarded to the Parish

four months without applying for it, although they were warned to comply. The Plaintiffs finally submitted the application in December of 1997, after the Sheriff shut down the business for providing alcoholic beverages outdoors without a permit. The permit was denied by the Director of Planning and Zoning and was then forwarded to the Parish Council for consideration . A hearing was held on January 5, 1998, during which five residents affected by the permit spoke against granting the permit and one person spoke in favor. Two of the residents contended that the loudness of the music was directly related to the consumption of alcoholic beverages because the more people drink, the louder they speak and the louder the music is played to compensate. Messina also spoke at the council meeting, arguing that he purchased the property in 1994 for the purpose of operating a wedding reception business. Since the land outside of the restaurant is visually appealing and the building was too small to hold large receptions inside, he set about making the outside suitable for large receptions. Messina said that he purchased large tents, built a deck, and put lights in the trees. He noted that he cannot operate profitably using just the inside of the building because of its small size. He disagreed that the alcohol ordinance would solve the noise problems and was upset that the ordinance was passed without first holding a meeting with the neighbors. Messina argued that the council could not use an alcohol ordinance to deny his permit because of noise when the object of the ordinance is

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Council for consideration.

to regulate alcohol, and there was no showing that the two were related. The Parish council tabled the matter to permit Messina and the neighbors to have a town meeting to attempt to resolve this problem. According to the petition, the meeting was not held and on February 2, 1998, the Parish council denied the permit.

On appeal, the Plaintiffs contend that the trial judge erred in granting the summary judgment because there are material issues of fact in dispute and because the Defendant is not entitled to a judgment as a matter of law. The Plaintiffs further assert that they were denied their constitutional rights of due process of law and equal protection and were deprived of property without just compensation.

PROCEDURAL DUE PROCESS OF LAW

The Fifth and Fourteenth Amendment of ths U.S. Constitution and La.Const.art. 1, § 2 provide that no person shall be deprived of life, liberty or property without due process of law. "Procedural due process imposes constraints on governmental decisions which deprive individuals of property interests within the meaning of the Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Martin v. Rush's Fabricare Center, Inc., 590 So.2d 707, 709 (La.App. 3d Cir. 1991). Thus, in any due process claim involving the loss of property, the claimant must show the existence of a property interest that has been adversely affected by the state action. Martin, 590 So.2d at 709. Further, affected persons have the right to be heard and in order that they may enjoy that right, they must first be notified. Jackson Court Condominiums, Inc. v. New Orleans, 874 F.2d 1070 (5th Cir. 1989); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). However, when a governmental action is characterized as legislative, procedural due process requirements do not apply. Jackson, 874 F.2d at 1074. Zoning decisions by city councils are characterized as legislative or quasi-legislative, thereby negating procedural due process claims. Id.; South Gwinnett v. Pruitt, 491 F.2d 5, 7 (5th Cir.) (en banc), cert. denied, 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974).

In this case, the Plaintiffs argue that they were denied procedural due process because the ordinance was amended without notice to them . However, the Plaintiffs

have no claim for procedural due process since the Parish council is a quasi-legislative body. Even so, the ordinance was discussed in a public hearing in which any interested party could participate, Messina knew about the ordinance after it was passed, yet waited four months to apply for the permit, and he participated in the discussion at the council meeting held in January of 1998 to determine whether he would receive a permit.

SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

The Plaintiffs argue that the Parish council's act of passing the ordinance and subsequently denying a permit to Messina's affected and vested right and forced the closure of this business. He explains that the building only holds 75 people and it would have been unprofitable to operate a wedding reception/party business in such a small area. He further stated that no one would book the facility without outdoor access to alcoholic beverages. The Plaintiffs also contend that the Parish council passed the ordinance solely to affect Messina's and there was no showing that any other restaurant would be affected, and that it was passed as a unconstitutional pretext to regulate noise.

Substantive due process rights are balanced against the police power of a governing authority to protect the health, safety, morals and general welfare of the people. State v. Edwards, 00-1246, 14, (La. 6/1/01), 787 So.2d 981, 992. Governments have an inherent need "to protect the safety and welfare of their citizens from the unrestrained

liberty of some individuals." Nowak, Constitutional Law 389 (1978), citing Corwin, Liberty Against Government 72 (1948); Edwards, 00-1246 at 15, 787 So.2d at 992.

In med. Exp. Ambulance Services, Inc., v. Evangeline Parish Police Jury, 96-0543, p. 7-8 (La. 11/25/96), 684 So.2d 359, 365, the Court analyzed the equal protection and due process provisions of the federal and state constitutions in the context of a local ordinance. The Court stated:

> Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in areas of social and economic policy, a statutory classification which does not proceed along suspect (FN10) or semi-suspect lines, (FN11) nor infringe on fundamental rights, (FN12) need only be rationally related to a legitimate governmental interest. City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). Similarly, the crux of the Due Process Clause of the Fourteenth Amendment, is protection from arbitrary and unreasonable action and when the ordinance or statute does not affect fundamental rights, but rather is merely economic or social regulation, it need only have a rational

relationship to a legitimate governmental interest. Id.[2]

The Court distinguished between the federal constitution and the rights guaranteed under the Louisiana State constitution, stating that "The rights guaranteed under our state constitution are not always synonymous with federal constitutional rights," citing Crier v. Whitecloud, 496 So.2d 305 (La. 1986) and Sibley v. Bd. of Supervisors of Louisiana State University, 477 So.2d 305 1094 (La. 1985). In Sibley, the Louisiana Supreme Court rejected the three-tiered federal system standard of equal protection review for interpreting and applying the equal protection

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[2] Laws drawing lines along suspect classifications are subject to strict scrutiny and must be necessary to achieve a compelling state interest." Med Exp. Ambulance Services, Inc., 684 So.2d 365 at FN 10. "Laws drawing lines along semi-suspect classifications are subject to intermediate scrutiny and must substantially further an important state interest." Id. at FN 11. "Like laws drawn along suspect lines, laws impinging on fundamental rights are subject to strict scrutiny." Id. at FN 12.

clause of our state constitution found in Article I, §3.[3] The Court shifted the focus from determining under which category a particular case falls (strict, intermediate, or minimum scrutiny), which then all but decided the case, to that of conducting an independent review of the specific merits of the individual case which necessarily entails a balancing or comparative evaluation of governmental and individual interests. Sibley, 477 So.2d at 1107; PANO v. City of New Orleans, 94-1078, p. 16 (La. 1/17/95), 649 So.2d 951, 963. The Court stated that La.Const. Art. I, § 3,

> "commands the courts to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be

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[3] Article I, § 3 provides in pertinent part:

> No person shall be denied the equal protection of laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition or political ideas or affiliations....

> refused unless the state or other advocate of the classification shows that the classification has a reasonable basis; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.

Sibley, 477 So.2d at 1107-08.

"Under the third level of scrutiny, the law creating the classifications is presumed constitutional and the party challenging the constitutionality of the law has the burden of proving it unconstitutional."[4] Med Exp. Ambulance Service, Inc., 96-0543 at 10, 684 So.2d at 367.

In this case, the ordinance is not based on any classification enumerated in Article I, § 3, nor does it involved a suspect or semi-suspect class. Thus, the ordinance must be upheld unless the Plaintiff can show that it does not further an appropriate governmental interest under the state constitution, or that is not rationally related to a legitimate governmental interest, as required by the federal constitution. The Plaintiffs have produced no evidence to meet this burden, so the ordinance is presumed constitutional. The health, safety, and welfare of citizens

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[4] Manuel v. Louisiana, 95-2189, p. 5 (La. 7/2/96), 677 So.2d 116, 120.

are appropriate government interests, and alcohol regulation are directly related to the health, safety and welfare of the citizens.

The Parish council has the authority under law to enact ordinances to curtail noise or the unruly behavior associated with alcohol consumption in a specific location. See: West Central Louisiana Entertainment, Inc. v. City of Leesville, 594 So.2d 973 (La. App. 3d Cir. 1992); Callaghan v. Congemi, 1995 WL 354844 (E.D.La. 1995). Municipal or parochial regulation of intoxicating beverages may be more stringent or restrictive than state law regulations if "appropriate to the necessities of the locality and that it is not in itself unreasonable." City of Lafayette v. Elias, 232 La. 700, 95 So.2d 281, 284 (1957). Vonderhaar v. Parish of St. Tammany, 633 So.2d 217, 221 (La.App. 1st Cir. 1993). If a rational basis can be found for the ordinance, the motive behind its passage is not subject to review as to whether the purpose of the statute can actually be fulfilled. FCC v. Beach Communications, Inc., 124 L.Ed.2d 211, 508 U.S. 307, 113 S.Ct. 2096, 2102 (1993), on remand, 1993 U.S. App. LEXIS 34955 (D.C. Cir. Oct. 22 1993).

In this case, the Plaintiff has no fundamental right to serve alcoholic beverages. Although the denial of the permit affects the scope of his business, the ordinance does not affect his right to conduct either a restaurant business or a reception business. His right to provide alcoholic beverages inside was not revoked by the ordinance. The ordinance is merely economic or social regulation. Thus, it need only have a rational relationship to a legitimate

governmental interest. Here, the restriction on alcohol outdoors has a rational relationship to a legitimate governmental interest, which is to regulate noise nuisance. Based on comments made in the Parish council meetings, the Parish council concluded that removing the exemption for restaurants was the best way to regulate the noise caused by loud music at outside parties. We find that this is not an unreasonable approach to the problem. Since the ordinance does not affect a fundamental right, does not constitute arbitrary and unreasonable action, and is rationally related to a legitimate government interest, it does not violate the federal or the state's due process protections.[5] For the same reasons, we find that denial of the permit was no an unlawful taking without just compensation.

SUMMARY JUDGMENT

A summary judgment is reviewed by the appellate courts de novo, using the same criteria applied by the trial courts to determine whether summary judgment is appropriate. Smith v. Our Lady of the Lake Hosp., 93-2513, p. 26 (La. 7/5/94), 639 So.2d 730, 750; Garrison v. Tanenbaum, 02-1181, p. 4 (La.App. 5th Cir. 4/8/03), 846 So.2d 40, 42.

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[5] We note that the property in question was initially built as a law office and later opened as a bar and restaurant. The houses surrounding the building were in existence before the building was built. The Plaintiffs furthermore did not have a vested right to an outdoor alcohol permit.

The burden of proof is on the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the trial court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the trial court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Garrison, 02-1181 at 5, 846 So.2d at 43. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. Id.; La. C.C.P. art. 966(C)(2). After the motion for summary judgment has been properly supported by the moving party, the failure of the adverse party to produce evidence of a material factual dispute mandates the granting of the motion. Garrison, 02-1181 at 5, 846 So.2d at 43.

We find that summary judgment was properly granted by the trial judge. We have determined that the trial judge did not err in finding that the Defendant did not violate any constitutional rights of the Plaintiffs. Thus, there are no material issues of disputed fact left to be resolved that would affect the outcome of the case and the Parish is entitled to a judgment as a matter of law.

Accordingly, the judgment of the trial court is hereby affirmed. Costs of the appeal are to be paid by the Plaintiffs.

AFFIRMED

The Supreme Court of the State of Louisiana

ANDREW MESSINA, JR.

VS. NO. 2004-C-0285

ST. CHARLES PARISH COUNCIL

IN RE: Messina, Andrew, Jr.; D&G Productions, Inc.; Plaintiff(s); Applying for Writ of Certiorari and/or Review, Parish of St. Charles, 29th Judicial District Court Div. D, Nos. 50,029; to the Court of Appeal, Fifth Circuit, No. 03-CA-644

March 26, 2004
Denied.

CDT
PFC
CDK
BJJ
JPV
JTK
JLW

Supreme Court of Louisiana
March 26, 2004

s/Katherine A. Fontana
Deputy Clerk of Court
For the Court

(2)

No. 04-279

IN THE

Supreme Court of the United States

ANDREW G. MESSINA, JR. and D&G PRODUCTIONS, INC.,

Petitioners,

v.

THE PARISH OF ST. CHARLES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF LOUISIANA, FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT THE PARISH OF ST. CHARLES

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STATEMENT OF THE CASE

I. Introduction

This writ opposition is made on behalf of the Parish of St. Charles. Respondent submits that the Petitioner has not set forth compelling reasons under United States Supreme Court Rule 10 to warrant the granting of its writ application. This is a simple case in which the respondent, a political subdivision of the state of Louisiana, validly exercised its police powers to achieve peace in neighborhoods that were located next to outdoor drinking establishments. This case does not involve respondent regulating or restricting the content of Petitioner's speech or expression. Moreover, this case does not involve respondent taking any of Petitioner's property. The Petitioner's writ application should be denied.

II. Facts and Procedural History

In April 1994, the plaintiff, D&G, through its president Andrew Messina, Jr., leased a building at 20 Avenue of the Oaks, Destrehan, Louisiana for the purpose of operating a wedding reception hall and restaurant. The restaurant and wedding reception hall was known as Messina's Oak Plantation ("Messina's"). In the next three years, business at Messina's steadily grew, having booked wedding receptions almost each weekend. The indoor facility was 3,000 to 4,000 square feet with a maximum holding capacity of 75 people. There was also a considerably larger outdoor tent that could accommodate 250 people. The wedding receptions utilized the outdoor and indoor areas of Messina's, and alcohol was frequently consumed in the outdoor area. Messina's was located within 500 feet of a residential neighborhood.

In 1997, many residential neighbors complained to Messina about the increasing noise levels associated with outdoor alcohol consumption at these wedding receptions. Neighbors reported that the noise continued through midnight and would even shake the tables in their homes. The neighbors and councilman Philips attempted to work with Messina's to lower the noise level. Mr. Messina showed no willingness to compromise and responded to the neighbors and Councilman Philips, "do what you need to do."

At that time in St. Charles Parish, concerns were rampant over alcohol consumption at outdoor drinking establishments because of the increased noise and other associated evils that disturbed the peace in neighborhoods located next to such establishments. In response to those concerns, on August 5, 1997, the Parish Council passed Ordinance #97-8-1 which amended Section 3-6 by eliminating the exemptions that restaurants enjoyed from regulations governing the consumption of alcoholic beverages in outdoor areas. *Contrary to petitioner's representations, D&G was operating under an exemption prior to the passage of the Ordinance. D&G never specifically had a permit to allow its patrons to consume alcohol in the outdoor areas of its premises.*

Specifically, the amendment provided that **negative impacts to adjoining residential areas from outdoor drinking areas at local restaurant establishments** prompted the need to revise the cited restaurant exemption. The amendment provided that a restaurant or barroom proprietor shall file a permit application for outdoor alcoholic beverage consumption with the Director of Planning and Zoning. The Department of Planning and Zoning would then post the applicant's property with notice of the permit request for a five day period. If no negative commentary was received

on the application from any property owner within 500 feet of the applicant's affected property, the director may approve the application, with stated reasons. If negative commentary was received from eligible property owners, the permit application would be forwarded to the Council secretary for consideration by the Parish Council. Also, if the director disapproved the application in the absence of negative comment, the applicant would be able to appeal that decision to the Parish Council.

Although the amendment was passed on August 5, 1997, petitioner deliberately ignored the provisions of the ordinance. Indeed, after the ordinance was passed, D&G kept booking wedding receptions as if it was immune from the provisions of the ordinance. D&G's continued defiance forced sheriff's deputies to physically enforce the ordinance at the facility. D&G finally submitted an application for an outdoor alcohol consumption permit on December 9, 1997, some four months after the passage of the ordinance.

The required notice was posted, and four property owners within the prescribed distance objected to the outdoor alcohol consumption permit on December 15, 1997. These individuals were Huey Long, Leonard Walsten, Denise Walsten, Henry Boudin, and James Waguespack. On January 5, 1998, the permit application was then tabled for consideration by the Parish Council. **The Council heard from Mr. Messina and neighbors who opposed the permit application.** On February 2, 1998, the Parish Council denied petitioner's permit application.

D & G filed an original petition on July 15, 1998, and supplemental petitions on March 1, 2000 and September 20, 2000, asserting equal protection claims, due process claims and a takings claim against respondent for the passage of this ordinance, and the denial of its permit. Respondent filed a Motion for Summary Judgment on January 3, 2003, arguing that plaintiff did not have a vested property right to allow the consumption of alcoholic beverages in the outdoor areas of his business. Moreover, respondent argued that it was within its right to police the outdoor consumption of alcohol at restaurants to rationally achieve the legitimate governmental objective of preserving the peace in adjoining neighborhoods.

On February 10, 2003, the 29th Judicial District Court for the Parish of St. Charles granted Respondent's Motion for Summary Judgment. The trial court held that the Parish's exercise of its police powers in regulating the outdoor consumption of alcoholic beverages at restaurants did not violate the plaintiff's due process, equal protection, and First Amendment rights and did not constitute a taking without just compensation. On March 19, 2003, that Court issued Reasons for Judgment. On December 30, 2003, the Louisiana Fifth Circuit Court of Appeal affirmed. On March 26, 2004, the Louisiana Supreme Court denied the Petitioner's writ application.

REASONS FOR DENYING THE PETITION

Petitioner asserts three reasons to support a granting of its writ application. First, petitioner asserts that the Louisiana Fifth Circuit Court of Appeal erred by failing to render a full opinion that addressed the dispositive issues in this case. Second, petitioner asserts that the Louisiana Fifth Circuit erred by not finding a genuine issue of material fact as to whether respondent violated the petitioner's rights to freedom of expression. Third, petitioner asserts that the Louisiana Fifth Circuit erred by not finding a genuine issue of material fact as to whether the respondent's actions constituted a taking and a violation of the petitioner's substantive due process rights.

D & G's reasons in its Petition for a Writ of Certiorari are meritless. The Petitioner's writ application fails to articulate compelling reasons for the granting of the writ. The Petitioner's reasons do not fall within the considerations set forth in United States Supreme Court Rule 10 for the granting of a writ application. Further, they fall woefully short of making any showing sufficient for this Court to exercise its supervisory jurisdiction. The Petitioner's writ application should be denied.

I. The Louisiana Fifth Circuit Addressed Every Assignment of Error that Petitioner Raised on Appeal.

Contrary to petitioner's assertion, the Louisiana Fifth Circuit rendered an opinion that addressed every assignment of error raised on appeal, including petitioner's pretext argument. On page 6 of its opinion, the court stated "The plaintiffs also contend that the parish council passed the

Ordinance solely to affect Messina's and there was no showing that any restaurant would be affected, **and that it was passed as an unconstitutional pretext to regulate noise.**[1]

In its opinion, specifically the section entitled Substantive Due Process and Equal Protection, the court addressed the pretext argument. Specifically, on page 9 of its opinion, the Louisiana Fifth Circuit opined that the plaintiff had no fundamental right to serve alcoholic beverages. The court stated, "his right to provide alcoholic beverages inside was not revoked by the Ordinance. The Ordinance is merely economic or social regulation. Thus, it need only have a rational relationship to a legitimate governmental interest. **Here, the restriction on alcohol endorses a rational relationship to a legitimate governmental interest, which is to regulate noise nuisance. Based on comments made in the parish council meetings, the parish council concluded that removing the exemption for restaurants was the best way to regulate the noise caused by loud music at outside parties. We find that this is not an unreasonable approach to the problem."** (Emphasis added)

Petitioner's argument that the Louisiana Fifth Circuit's opinion is a gross departure from proper judicial proceedings is completely misplaced. The Louisiana Fifth Circuit held that the subject regulation was a constitutional ordinance that bore a rational relationship to the governmental interest of curtailing substantial noise in residential areas. Therefore, respondent validly exercised its police powers, as articulated by the Louisiana Fifth Circuit in its opinion. Petitioner's first reason for the granting of the writ has no merit, and its application should be denied.

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1. Please see Louisiana Fifth Circuit opinion attached as an appendix to Petitioner's writ application.

II. No Issue of Fact Existed That Respondent Did Not Violate Petitioner's First Amendment Rights.

There was clearly no issue of fact that respondent did not violate petitioner's right to freedom of expression. Respondent may decide the proper legislative ordinance to best protect the public, as long as it is rationally related to that purpose. If an ordinance that involved decibel-counting was not to be the most effective mechanism to preserve peace in areas next to outdoor drinking areas, the respondent is surely free to pass another regulation that serves the legitimate governmental objective. As this Court stated in *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 113 S. Ct. 2096, 2102 (1993), *on remand*, 1993 WL 523834, 1993 U.S. App. LEXIS 34955 (D.C. Cir. Oct. 22, 1993), "A legislative choice is not subject to court-room fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 2102.

The subject ordinance is tailored to protect the governmental objective of reducing noise in residential areas, not to curtail the petitioner's first amendment rights. Indeed, D&G was free to hold receptions outside and publicly express its concerns and/or views as long as alcoholic beverages were not consumed outside. *Freedom of speech and outdoor wedding receptions were not the proscribed activities*; the outdoor consumption of alcoholic beverages was the prohibited activity.

The cases that petitioner cites have no similarity to the situation at hand. The *Newport v. Fact Concerts, Inc.*, 626 F.2d 1060 (1st Cir. 1980) case involves issues related to the content of what the rock group, Blood, Sweat and Tears, played at concerts. The restriction was directly related to the

content of the speech or expression by that rock group. Here, the subject ordinance is related to alcohol consumption in outdoor areas, it is not related to the content of any noise. Petitioner's pretext argument is misplaced and does not compel the granting of its writ application.

Moreover, where the governmental interest sought to be regulated is unrelated to suppression of expression, the law will be upheld in certain cases, despite its incidental limitation on expressive activity. *See State v. Larson*, 653 So. 2d 1158, 94-1237 (La. 4/10/95), wherein it was held that a regulation prohibiting public nudity in conjunction with the sale of alcoholic beverages was a reasonable restriction that did not impermissibly curtail First Amendment rights.

Here, the governmental interest sought to be regulated, the outdoor consumption of alcohol in restaurants, is unrelated to the suppression of expression. The passage of the ordinance and denial of the permit application was correctly upheld by the trial court and the Louisiana Fifth Circuit, despite any inadvertent limitation on expressive activity, which did not occur. Petitioner's writ application should be denied.

III. Petitioner Is Unable to Show That Respondent's Actions Constituted a Taking and a Violation of its Substantive Due Process Rights.

Petitioner could not create an issue of fact that respondent's actions did not constitute a taking and/or a violation of its substantive due process rights. The Fifth Amendment prohibition against taking without compensation does not guarantee the most profitable use of the property."[2]

2. *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989).

A diminution in value standing alone, does not establish a taking.[3] The record indicates that petitioner was concerned it would not be as profitable under Ordinance #97-8-1 as it was prior to its passage. Petitioner admitted in his deposition that he was in the wedding hall business to make a big profit, or otherwise he was not going to bother getting involved with this business.

First, petitioner admitted that it knew about the ordinance but failed to comply with it for four months.[4]

> Q. You knew about the ordinance in August of 1997?
>
> A. Absolutely, and when he showed up and brought me that sheet of paper.
>
> Q. So it would be a fair statement to say that, for four months, you were not in compliance with the ordinance, correct?
>
> A. Based on what they were saying.[5]
>
> * * *
>
> Q. Right. I understand. I am just asking specifically about your business, assuming that it would have survived, that you ever t ed to — did you ever give thought to strictly operating as an indoor wedding reception facility?
>
> A. No.

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3. *Id.*

4. Deposition transcript, appendix 2, p. 41, lines 19-25.

5. Appendix 2, p. 42, line 1.

Q. I am just asking you to make an assumption that you would have survived. Did you ever give thought to —

A. No. We didn't open the building predicated on the numbers generated with people in the building. We generated on numbers on making profits with having two, three, four, 500 people, not 50, 60, 70. That was a waste of time, and it wouldn't have paid the bills. . . .

Q. Would it have been profitable to operate in an indoor wedding facility?

A. No, sir.

Q. Why is that, for what specific reason?

A. Well, you look at risk versus reward, it wasn't worth Messina's time and effort. That is number one.

Q. But if you — if you had received high, high volume of indoor wedding receptions, could you have turned a profit, possibly?

A. Possibly, but not to the standards of Messina's.

Q. What are the standards of Messina's?

A. To open up a catering facility and not make, net profit, a $150,000 to $200,000 or higher, there is no need in pursuing it.

Q. So you want to explode as far as profit is concerned?

A. Yes, why do it otherwise? Everything else we're doing is going wonderful. Why go into a venture where you are spinning your wheels?[6]

Similarly, in *Liberto v. Rapides Parish Police Jury*, 667 So. 2d 552, 95-456 (La. App. 3d Cir. 11/2/95), the owner of the club testified that if the ordinance went into effect, he would be unable to continue to operate his club profitably at its current hours of operation. He further stated that no other business except his was discussed at the meeting when the full police jury recommended the new ordinance for passage. The court concluded that the ordinance did not impermissibly interfere with or mandate closure of the business. The business could remain open under the ordinance during its regular hours between 12 midnight and 5 a.m. on weekends. Its patrons, however, could not consume alcoholic beverages between the hours of 2 a.m. and 5 a.m. **The court viewed this limited regulation as necessary to the accomplishment of a proper purpose within the inherent police power of the police jury**.

Petitioner's testimony reveals its desire to make the highest profit possible at the expense of the peace in the surrounding neighborhoods. The Parish Council acted legitimately in enacting an ordinance to preserve neighborhood integrity. Petitioner could not establish issues of fact with respect to any of its claims. The trial court properly entered summary judgment in favor of St. Charles Parish. The Louisiana Fifth Circuit properly affirmed that ruling in every respect. The Louisiana Supreme Court properly denied the writ application. The petitioner has failed to set forth any compelling factors that warrant the granting of its writ application.

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6. Appendix 2, pp. 89, 90, 91.

CONCLUSION

Petitioner has failed to demonstrate that the St. Charles Parish acted arbitrarily or capriciously in passing the subject ordinance and denying the petitioner's permit application. Petitioner was given the opportunity to be heard before the Parish Council on its permit application. The ordinance was passed to preserve the legitimate government objective of preserving the peace in residential neighborhoods that were located immediately next to eating and drinking establishments. The actions at issue were a valid exercise of the state's police powers. Petitioner has failed to set forth any factors that warrant the granting of its writ application. Its writ application should be denied in all respects.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS OF DEPOSITION OF ANDREW G. MESSINA, JR. DATED MAY 22, 2002

TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES
STATE OF LOUISIANA

NO. 50-025

DIV. "E"

ANDREW G. MESSINA, JR., ET AL

VERSUS

THE PARISH OF ST. CHARLES, ET AL

[Commencing at page 41]

Q. Let me show you what I'll mark as Exhibit No. 4.

(The instrument referred to was marked Exhibit 4 for identification and is attached hereto).

BY MR. DABDOUB:

Q. Does that look like a copy-of the application?

A. Yes, Sir.

Q. And is that -- was this completed by you?

A. Yes, Sir.

Q. Is that your signature right there, sir (indicating)?

A. Yes, Sir.

Q. What is the date there?

A. December 8th, 1997.

Q. You knew about the ordinance in August of 1997?

A. Absolutely, when he showed up and brought me that sheet of paper.

Q. So it would be a fair statement to say that, for four months, you were not in compliance with the ordinance, correct?

[42] A. Based on what they were saying.

Q. Just -- I'm just asking based on the time.

MR. VENEZIA:

I'm going to object because I think that that calls for an opinion or ultimate conclusion as to whether he was in compliance with the ordinance or not.

MR. DABDOUB:

Objection noted.

BY MR. DABDOUB:

Q. You knew about the ordinance in August of 1997. Can you tell me why you waited for four months before sending the application in?

A. Yes, sir. At that time, being that I was there for four years, had all my permits, that I was Messina's Oaks Plantation and when I read the ordinance, it said plantations excluded, between the fact I was there four years, between the fact plantations were excluded, I didn't feel like I was -- what is the right word? I didn't feel like I was the one they were looking for to fill it out. So I didn't until the police started showing up.

* * *

[89] * * *

Q. Did you ever try to book future parties to be held indoors?

A. No. How? How?

Q. I'm asking you.

A. No, it was not possible. It was not possible. I had no income coming. I couldn't pay my rent, couldn't pay my electricity, couldn't pay the labor, and, if I book one based on a bride or any person thinking they could be outside for a picnic or a wedding, that is fraud.

Q. Right. I understand. I'm just asking specifically about your business, assuming that it would have survived, did you ever try to -- did you ever give thought to strictly operating as an indoor wedding reception facility?

A. No.

MR. VENEZIA:

I object. I think assuming survival is not what happened, and you're asking him to speculate as to [90] what could have happened in the future.

MR. DABDOUB:

Right.

BY MR. DABDOUB:

Q. I'm just asking you to make an assumption that you would have survived. Did you ever give thought to --

A. No. We didn't open the building predicated on the numbers generated with people in the building. We generated our numbers on making profits with having two, three, four, five hundred people, not fifty, sixty, seventy. That was a waste of time, and it wouldn't have paid the bills.

Q. What was the capacity of the indoor facility?

A. Max?

Q. At max.

A. At max, 75 would have been a serious crowd.

Q. Would it have been profitable to operate an indoor wedding facility?

A. No, Sir.

Q. Why is that, for what specific reason?

A. Well, you look at risk versus reward, [91] it wasn't worth Messina's time and effort. That is No. 1.

Q. But if you -- if you had received high, high volume of indoor wedding receptions, could you have turned a profit, possibly?

A. Possibly, but not to the standards of Messina's.

Q. What are the standards of Messina's?

A. To open up a catering facility and not make, net profit, a hundred fifty, two hundred thousand or higher, there is no need in pursuing it.

Q. So you want to explode as far as profit is concerned?

A. Yes. Why do it otherwise? Everything else we're doing is doing wonderful. Why go into a venture where you're spinning your wheels?

* * * *

Supreme Court, U.S.
FILED
MAR 18 2005
OFFICE OF THE CLERK

(3)

NO. 04-279

In the

Supreme Court of the United States

ANDREW MESSINA, JR.
AND D&G PRODUCTIONS, INC.

Petitioners,

v.

THE PARISH OF ST. CHARLES,
THE ST. CHARLES PARISH COUNCIL,
GREG CHAMPAGNE, IN HIS CAPACITY AS THE
SHERIFF & EX-OFFICIO TAX COLLECTOR
FOR THE PARISH OF ST. CHARLES,
AND DEPUTY PAM SCHMITT

Respondents,

On Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana to Review the Decision of the Louisiana Fifth Circuit Court of Appeal Affirming the Grant of Summary Judgment by the 29th Judicial District Court Parish of St. Charles

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

Andrew Messina, Jr. and D&G Productions, Inc., Petitioners, offer the following reply to the Parish of St. Charles' ("Parish") Brief in Opposition for Respondent ("Brief").

A. The Parish's Own Video Recorded Council Meeting Clearly and Unequivolcally Showed That The Unconstitutional Ordinance Was Enacted Solely To Restraint Noise, Not Alcohol As the Parish Now Disingenuously Argues

Although the Ordinance addresses itself toward alcoholic beverage consumption, it is clear from the hearing transcript that: 1) the only comments and concerns involved noise; and, 2) the sole objective of the Parish was to eliminate the noise emanating from Messina's Oaks Plantation.

> Mr. Huey Long:
> We have a problem there that's just - - It's just unreal. I mean, **the noise factor coming from the facility** that's next to our residence is just unbelievable.[1]

---

[1] Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 5 (emphasis supplied).

* * *

Mr. Huey Long:
And in saying this, I mean, you're welcome, any weekend, to come and listen to what - - if y'all don't pass this ordinance, **to listen to the music and the loud sound** that we're getting in our neighborhood.[2]

* * *

Councilman Duhe:
Mr. Long, **the noise problem**, is it more when they're having a reception outdoors, or - -

Mr. Huey Long:
Yes.[3]

* * *

Mr. Huey Long:
But there is absolutely **no way that you can gear down music** in a tent. It's like playing outside in a yard. You have to play it much

---

[2] Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 7 (emphasis supplied).

[3] Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 8 (emphasis supplied).

louder, because all the music escapes. And that's what's happening.[4]

* * *

Mr. Huey Long:
If it's not - - somebody doesn't govern or put a hand on something, **then it begins to get louder, and louder, and louder**. And we have to do something to **curtail the noise**, I mean, it's just - - It's just unbelievable, and it's uncalled for in a residential neighborhood.[5]

* * *

Mr. Ed Himel:
I moved into St. Charles Parish because it was such a nice and quiet parish, and moved in this neighborhood. And now you cannot enjoy your afternoons, or your Sundays, or whatever, in your back yard, **because the music's so loud** it's just like being at a reception. You have to talk over everybody

---

[4] Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 8 (emphasis supplied).

[5] Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 9 (emphasis supplied).

so you can have common communication.[6]

* * *

Mr. James Waguespack, Sr.:
There are times when you sit at your table, and glasses and stuff will float on your table, and noise vibrating it, **that's how bad the noise is**, and I think that is - - there's something they can do for it.[7]

* * *

Councilman Ramchandran:
They want to make sure that - - They like the restaurant. They want it to stay there and, at the same time, somehow **manage the noise**.[8]

* * *

Councilman Duhe:
Okay, Mr. Lassus, I'd still like you to

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6 Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 19 (emphasis supplied).

7 Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 20 (emphasis supplied).

8 Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 21 (emphasis supplied).

explain this to me; how that's going to **restrict the sound problem, the noise problem**, that they have in that area?[9]

* * *

Councilman Johnson:
But what I want to ask is not necessarily against this, **but the whole deal is noise**. Now, if you remember, we'd been trying to get a noise ordinance for a long time, and we finally got one. Why does that - - Why is it that that doesn't work, does anybody know?[10]

Throughout its forty-one pages, the Ordinance Hearing Transcript reveals not one single comment by the neighbors nor one single question from the Council concerning alcoholic beverages being served outdoors by Messina's Oaks Plantation nor any other public intoxication concerns. The sole concern was noise.

The Parish's ill-conceived and unconstitutional noise restraint plans were unmasked by Councilman Johnson's simple question: Why not pass a noise ordinance? The Parish's attorney answered Councilman Johnson's question

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9 Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 25 (emphasis supplied).

10 Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 31 (emphasis supplied).

by explaining the painstaking measures that the Parish would need to employ for a "property-line" noise ordinance to survive constitutional scrutiny.

> Mr. Lewis:
> The reason it doesn't work is the noise ordinance that we have is very specific to the various - - the location. And then the one we passed, it was, like, the State law that just got passed that is location specific, too, it applies to automobiles. So we're going to get around, I think, maybe, Mr. Johnson, to a **noise ordinance** that will work in these instances, but as I told you before, **they have to be very carefully tailored or they're found unconstitutional**.
>
> * * *
>
> But one that would work in this instance would have to be crafted totally different. It would have to be what I would call a, or refer to as a **property line noise ordinance**, and would have to have some different enforcement provisions.
>
> * * *
>
> [T]hey have very detailed instructions on how to enforce it, and the officers have to have these decibel counters, and those kinds

> of things. So I - - We - - **The Sheriff's Office is not really crazy about getting into the decibel-counting business** and that kind of thing, **so we have to work around that somehow**, but we are still considering it.[11]

Remarkably, instead of going through the "decibel-counting" trouble of affording Messina its constitutionally protected rights under our First Amendment, the Parish's attorney[12] advised the Parish to "work around" the First Amendment by arbitrarily requiring Messina to obtain a permit to serve alcohol outdoors. To little surprise, upon application for the permit, the Parish denied Messina's request to serve alcohol outdoors.

The Parish's Brief gives little more than one page and cites no distinguishing authority to controvert the unhesitant holding of Newport v. Fact Concerts, Inc.; specifically, governments are forbidden from using arbitrary pretexts to violate an individual's First Amendment Right to Freedom of Expression. Newport v. Fact Concerts, Inc.,

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[11] Appendix A, Ordinance Hearing Transcript, 8/5/97, p. 31-32 (emphasis supplied).

[12] It is particularly remarkable that it was the Parish's attorney, an officer of the court sworn by oath to uphold and protect the Constitution, that recommended the disingenuous "working around" of the First Amendment.

626 F.2d 1060 (1st Cir. 1980), *rev'd on other grounds*, 453 U.S. 247 (1981). The Parish merely dismisses Newport by pointing out that the governmental action in Newport was not content neutral.

However, a government's failure to be content-neutral is only one way a government can violate the First Amendment. As the Parish's attorney was well aware, this Honorable Court has long established that a constitutional noise ordinance must be: 1) content-neutral, and 2) narrowly drawn to regulate the hours or places or use of loud-speakers, or the volume of sound (the decibels) to which they may be adjusted. Saia v. New York, 334 U.S. 558 (1948); Polaris Amphitheater Concerts, Inc. v. City of Westerville, 267 F.3d 503 (6th Cir. 2001).

The "pretextual" motive of the Council could not be any clearer - - concoct a reason for Messina's to require the Council's arbitrary approval, and then put unconstitutional "stipulations" on the applicant's Freedom of Expression throughout the approval process. This Honorable Court affirmed the constitutional rule of law that courts must look past arbitrary "pretextual" legislation. Newport v. Fact Concerts, Inc., 626 F.2d 1060 (1st Cir. 1980), *rev'd on other grounds*, 453 U.S. 247 (1981).

The record in this case rings much truer than the Parish's self-serving, misleading and disingenuous arguments. As in the Newport case, this Honorable Court should once again look beyond the Parish's illusory distraction of alcohol regulation. This Honorable Court

should find that the Parish used alcohol regulation as a pretext to abridge Messina's First Amendment Freedom of Expression because the "Sheriff's Office [was] not really crazy about getting into the decibel-counting business." For these reasons, the Petitioners respectfully request that this Honorable Court grant Petitioners' request for discretionary review.

B. Rational Basis Analysis is Not a Carte-Blanche License for the Parish to Arbitrarily Violate the First Amendment

The Parish's Brief would also have this Honorable Court believe that no inquiry can be made into the motive behind the passage of an ordinance if a rational basis can be found. The Parish cites to this Honorable Court's decision in FCC v. Beach Communications, Inc., 508 U.S. 307, 113 S. Ct. 2096 (1993). However, the FCC case is easily distinguishable on two grounds: 1) The Appellate Court imposed an obligation on the Respondents to produce a rational basis for the Court's review where no such rational basis could otherwise be found in the record; and, 2) The record in FCC contained no evidence whatsoever that our Congress enacted The Cable Communications Policy Act of 1984 as a mere pretext to abridge a targeted individual's Constitutionally protected rights.

The FCC decision simply holds that if no rational basis is articulated within a legislative act, courts are not empowered to question legislative authority by requiring some measure of empirical study or proof.

No such guess work is required here to conduct the inquiry into the Parish's true motive. The entire ordinance enacting council meeting was preserved by video tape recording. The video tape recording was transcribed and stipulated to by the parties at the trial level. Accordingly, not only was the council intent preserved, but every single word spoken by or before the council is contained throughout the attached Appendix. The record clearly shows that the true motive of the council is numerous and unequivocal - - conjure up some "rational basis" alcohol regulation so that the Parish can appease a few disgruntled residents by getting rid of a noise problem.

Simply put, our rights to Free Expression should never fall to the arbitrary whim of a few disgruntled citizens nor to the whim of elected officials. This Honorable Court has always required that constitutional noise ordinances must give a potential violator of criminal statutes some reasonable and measured (that "crazy" decibel-counting thing) basis to know if he or she is committing a criminal noise violation. For these pretextual reasons, the Parish's ordinance could never bear a rational basis to a compelling governmental interest. For these reasons and those set forth in the Petition, the Petitioners respectfully request that this Honorable Court GRANT the writ of *certiorari*.

RESPECTFULLY SUBMITTED,

DAVID C. CLEMENT

March 16, 2005

APPENDIX A

Page 1

29th JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES
STATE OF LOUISIANA
NO. 50-029 DIVISION "E"

MESSINA
V.
THE PARISH OF ST. CHARLES, ET AL

* * * * * *

Transcription of Audio-Videotape Excerpts of the St. Charles Parish Council Meetings of August 5, 1997, January 5, 1998, and February 2, 1998, by Heidi Schwab, CCR, OCR, CVR, Associated Reporters, Inc., Ste. 3811, 201 St. Charles Avenue, New Orleans, Louisiana, upon the request of Karina P. Gentinetta, Esq., of the law firm of Montgomery, Barnett, Brown, Read, Hammond & Mintz.

* * * * * *

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August 5, 1997

* * *

CHAIRMAN CHAMPAGNE:

...meeting, Summary No. 4405, an Ordinance amending the Code of Ordinances, Sections 3 through 6, through the elimination of an existing exemption for Restaurants and regulations governing permitted outdoor areas where alcoholic beverages may be consumed.
Mr. Lassus? MR. LASSUS: Gentlemen, as you might be aware, there's a code provision in existence, at present, where a special permit is required for barrooms when an outdoor area is used for alcoholic beverage consumption. That
special permit is a no-fee permit which is issued to barrooms after a post-name and possible counsel-reviewperiod.Presently, restaurants and country clubs are exempt from that particular provision. It has come to light through a fairly dramatic example in Destrehan, that that situation, that being the exemption for

restaurants, may not be -may be subject to some concern and possible revision, and, as a result, we're offering this summary, 4405, which would remove the exemption for restaurants, and subject restaurants to this special permitting process If you'd like me to ver the permitting section in the code, as it exists, I will.

CHAIRMAN CHAMPAGNE:

You could go into it, Mr. Lassus.

MR. LASSUS:

Basically, the applicant shall file a no-fee permit application for said use with the Director of Planning and Zoning.The Department of Planning and Zoning shall post the applicant's property with notice of the permit request for five days. If no negative commentary is received on the application from any property owner within 500 feet of the
applicant's affected property - I think that's a special note that you should take, is that only within 500 feet of the applicant's property can comment - the

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Director may approve the application with stated reasons. Should a negative comment be received from eligible property owners, the permit application shall be forwarded to the Council's secretary for timely consideration by the Parish Council. Also, should the Director disapprove the application in the absence of negative comment, the applicant may appeal that negative decision to the Council for consideration. Barrooms which are immediately adjacent to residentially-owned property shall not be eligible for the application. If you have any questions, Ill be glad to answer them.

CHAIRMAN CHAMPAGNE:

We'll get into the questions after the public hearing. We'll now have Public Hearing Summary No. 4405. Anyone wishing to address the Council, please come forward.
Please state your name and address for the record.

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MR. LONG:

Huey P. Long, 131 Murray Hill Drive, in Destrehan.

CHAIRMAN CHAMPAGNE:

I though there was only one of him.

MR. LONG:

The last I'm the last of the Kingfish. (Laughter)

MR. LONG:

I think most of you have received a copy of the petition that we, the concerned residents in that area of Murray Hill Drive in the upper part of Ormond Oaks, have circulated and signed. We have a problem there that's just -It's just unreal. I mean, the noise factor coming from the facility that's next to our residence is just unbelievable. I think this ordinance that, that hopefully, that everyone will approve tonight, will help us and also keep this from happening in another area in this parish.

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You know, as our parish moves forward - and it will - I think it's very important that we preserve and protect the residential areas that we have now. Using Murray Hill Drive, for example, it's forty years old, or maybe a little older. About 35% of the people in that area now are retired. It's still a well-kept subdivision. These are the kind of advertisement things that we need for this parish, in order for people that eventually, as the older people move out, the younger people will continue to move into this parish and want to live here.Now, you know, if -The bad

publicity, and y'all know that as well as I do, travels a lot faster than anything good that anyone does or tries to do to make this parish better. I know all of y'all, you know, y'all don't have an easy job. Everybody, you know, you get a lot of criticism, and everything, for some of the decisions you make.

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But the thing that you should do is think what would happen if 'I' was in the position of that particular individual, individual or group of people, living in an area that wanted to just live there, and retire, and enjoy themselves, and then begin to get something that was really disrupting to the whole neighborhood. You should take in consideration and always cast your vote, and it's not easy to do, cast your vote for what -the majority of the people and the good of St. Charles Parish. And in saying this, I mean, you're welcome, any weekend, to come and listen to what -if y'all don't pass this ordinance, to listen to the music and the loud sound that we're getting in out neighborhood. I and all the residents in that area, we hope that tonight that you will really support this thing fully, so that everybody understands that you people and the people of St. Charles Parish are

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demanding that we're going to have residential areas that we can relax and enjoy things, for our family. Thank you. Dick?

CHAIRMAN CHAMPAGNE:

Thank you, Mr. Long.

Mr. Duhe?

MR. DUHE:

Mr. Long, the noise problem, is it more when they're have a reception outdoors, or--

MR. LONG:

Yes.

MR. DUHE:

-and there's a band? How about when they're having a reception indoors and there's a band?

MR. LONG:

No, they have an outside area that has a -it's a tent. Very few reception halls that you -you know, that I've been in, would operate in a tent on the outside. And you know, I don't want to be a negative person. We want as much industry

as we can, and bear these places to come in this parish. But there is absolutely no way that you can gear down music in a tent. It's like playing outside in a yard. You have to play it much louder, because all the music escapes. And that's what's happening.

MR. DUHE:

How about when a reception's held indoors, in that a problem with the neighbors?

MR. LONG:

They don't -I don't know of any--They don't have the room inside to have a wedding reception on the inside. It's started off now, sometimes it's on Friday, two times on Saturday, and sometimes on Sunday. It's beginning to -And, of course, as any law that's not passed, it begins to become more and more of a problem. If it's not -somebody doesn't govern or put a hand on something, then it begins to get louder, and louder, and louder. And we have to do something to

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curtail the noise, I mean, it's just -It's just unbelievable, and it's uncalled for in a residential neighborhood.

MR. DUHE:

One more question, then. Some of the receptions, they go late into the night?

MR. LONG:

I have made phone calls, you know, trying to get along. We will -You know, again, I want to try to be a good neighbor to anyone I'm next to. Sometimes they run past 11:00 o'clock. If I call, bang! They quit. And it's, just, I don't have the time, and I'm sure y'all don't have the time to call and police this thing. It should have some kind of law guiding them on what they are to do, and they have to abide by it.
Any other questions? (NO RESPONSE)

CHAIRMAN CHAMPAGNE:

Thank you, Mr. Long. Thank you.

MR. LONG:

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All right.

CHAIRMAN CHAMPAGNE:

Anyone else wishing to comment on Summary No. 4405? Please step forward. Please state your name.

MR. SIRMON:

Lou Sirmon, 326 Baupre, Luling. I'm
here representing The Cajuns. The noise ordinance -I want to back up a second. We, at The Cajuns, have a deck that we use for lunchtime, during -when weather permits and it's not too hot, and, also, for the afternoon for the lounge area, our permitting of alcohol or non-alcoholic beverages, and we built the deck in '94,when we went to Mr. Lassus and the Planning Committee. And, subsequently, and I said '94, around '94, I think Mr. Duhe and Mr. Tregre, I was on their committee - correct me if I'm wrong - we did some investigating into some alcoholic beverages ordinances, and everything, and part of this recommendation that's here now that the Council is

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addressing, addressed that in that committee. And that's why, I guess, country clubs and restaurants were excluded. And I do

know that it is a problem, and I can understand what he's saying. I have a question I might like to address to Mr. Lassus. How many restuarants in St. Charles Parish border a residential area that, you know, this could affect? Is

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it just affecting mine and the other one across the river, or do we have several other restaurants like that throughout the parish? I don't know. I'm just asking the question.

MR. LASSUS:

Offhand, I'm not familiar with any others than those two.

MR. SIRMON:

Okay, well, I think, you know, before you make a decision like this, I think you really need to look into all the other things. That was the question I'd like to know; how many other people does it affect, and what effect does it have on my little place, The Cajuns, in Luling, if this goes into effect? We don't have parties, or -We've had inside weddings, but we haven't had anything on the grounds. We don't have the grounds that are as beautiful as the one across the river that you're talking about, particularly.

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But that's the only reason I came here and addressed y'all; because I have some concerns about it. We've complied with all of the rules in building the deck, and everything else, with St. Charles Parish, and now they come in afterwards, after we have spent money and done some things to promote the business. Then my only alternative would be to enclose the deck, and, right

now, I really wouldn't want to go to that expense. Anybody have any questions?(NO RESPONSE)

CHAIRMAN CHAMPAGNE:

Thank you, sir.

MR. SIRMON:

Thank you.

CHAIRMAN CHAMPAGNE:

Anyone else wishing to comment on Summary No. 4405?

MS. VIAL:

Debby Dufrene Vial, 135 Lakewood Drive, Luling, representing Esperanza Restaurant, on River Road, in Luling. I read through the ordinance that

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the Council has this evening, and I just had a few things that I wanted to, maybe, bring up for consideration by the Council members before approving this ordinance. The -I certainly emphasize with the residents. Their concerns are very legitimate. Based on the comments that were made this evening, most of them are addressed toward the noise, which is a factor, I think, that is being needed to be addressed in conjunction with this particular ordinance regarding the consumption of alcoholic beverages in outdoor areas. Currently, the changes that I noted that were being made is, basically, the last line of the current ordinance. Section (E) was being changed, and then Section (F)

was the omission of restaurants. In Part (E), you say that "If no negative comment is received on the application from any property owner within 500 feet of the applicant's affected property, the Director may approve the application", and so on.

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What I would like to request that the Council possibly consider is, in their "Exclusions", that you would prohibit restaurants that are outside that 500-foot range, or maybe another, you know, denomination of feet that you would come up with that would be reasonable. My particular situation, I don't have outdoor areas where we hold receptions and have loud music. We don't have any residences, you know, within earshot or ability to throw debris. I know that's sometimes a concern for people around restaurants and fast food chains; that there's a lot garbage from the cups and paper bags, and things, that are served in. But I would like to request that you would consider that if, you know, a specified amount of feet from a residence, a business would not be required to have to apply for this permit. I'm one of those business people that hate to fill out all these permit forms that everybody's always complaining about, the permitting process, as being so

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cumbersome. If you've built up a particular business in an area where if you're not going to impact a residential area, it would be one less form we would have to fill out. I also wanted to ask if this permit that would be required, is it a one-time permit, or would it have to be done annually? It's just one time?

MR. LASSUS:

One time.

CHAIRMAN CHAMPAGNE:

Mr. Lassus?

MR. LASSUS:

This is a one-time permit.

MS. VIAL:

One-time permit? And I noticed in the existing ordinance there are penalties, usually, when you don't comply with applying for a permit. Is there any penalty for not -I'm just looking at will this rectify the situation for this particular residential area. What if businesses don't apply for it?

MR. LASSUS:

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Yeah. Yes, there is a penalty outlined in that subsection of the code. "Any person violating the provisions of this section will be punished by a fine of not more than $500, or"--

MS. VIAL:

But that's for Section 36 (C).

MR. LASSUS:

It's (D).

CHAIRMAN CHAMPAGNE:

(D).

MR. LASSUS:

Subsection (D).

MS. VIAL:

Okay, penalty--

CHAIRMAN CHAMPAGNE:

It's page 183 in this -Yeah.

MR. LASSUS:

Are you referring to "That penalty only affects Subsection (C)"?

MS. VIAL:

Yeah. So, I mean, the way it's written, we don't even have a penalty if nobody files for the application--

MR. LASSUS:

Well--

MS. VIAL:

- for the permit.

MR. LASSUS:

- the Code Enforcement section would take legal action to enforce it--

MS. VIAL:

Okay.

MR. LASSUS:

- through the courts.

MS. VIAL:

And then--

CHAIRMAN CHAMPAGNE:

Ms. Vial, thirty seconds.

MS. VIAL:

And then the only other thing is I just had a question, this is in general, it doesn't affect me, but the last statement of Section (E) says "Barrooms which are immediately adjacent to residentially-owned property shall not be eligible for application". What happens to existing barrooms that may be

adjacent to, will they be grandfathered in, or are they required to

comply with this ordinance?

MR. LASSUS:

They're not grandfathered in.

MS. VIAL:

They're not grandfathered?

MR. LASSUS:

Right.

MS. VIAL:

Okay, that's all I have. Thank you very much.

CHAIRMAN CHAMPAGNE:

Thank you. Anyone else wishing to comment on Summary No. 4405? Please state your name and address.

MR. HIMEL:

Ed Himel, 109 Murray Hill Drive. Mr. Huey told y'all what, mostly, was happening. I moved into St. Charles Parish because it was such a nice and quiet parish, and moved in this neighborhood. And now you cannot enjoy your afternoons, or your Sundays, or whatever, in your backyard, because the music's

so loud it's just like you being at a reception. You have to talk over everybody so you can have common

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communication. I'd ask y'all to please support this.

CHAIRMAN CHAMPAGNE:

Thank you. Anyone else wishing to comment on Summary No. 4405?

MR. WAGUESPACK:

James Waguespack, Sr., 134 Murray Hill Drive. I would appreciate you supporting this ordinance, also. There are times when you sit at your table, and glasses and stuff will float on your table, and noise vibrating it, that's how bad the noise is, and I think that is -there's something they can do for it.

CHAIRMAN CHAMPAGNE:

Thank you, Mr. Waguespack. Anyone else wishing to comment? We're here on Public Hearing Summary No. 4405.(NO RESPONSE)
Anyone wishing to comment, please step forward. Anyone wishing to comment on
Summary No. 4405?(NO RESPONSE)

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Public Hearing is closed. Any Council discussion? Mr. Ram?

MR. RAMCHANDRAN:

Mr. Lassus, the exemptions you have, when the Department turns it down, the application can go to the Council. What happens to the ZPA process?

MR. LASSUS:

This particular appeal process was decided upon by a council committee that Mr. Duhe headed in 1994, I believe, and there were a group of committee members that got together for a number of months and decided that this would be the best appeal process for this particular function in government.

MR. RAMCHANDRAN:

And since I talked to some of the residents in the neighborhood, almost uniformly they are not against any businesses. They want to make sure that - They like the restaurant. They want it to stay there and, at the same time, somehow manage the noise.

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MR. LASSUS:

Right. This wouldn't -This would allow this issue to come before the Council so that maybe some sort of ground rules could be laid for the business to operate that would be amenable to both sides. I think it's -it could work out for the best advantage of both, really.

MR. RAMCHANDRAN:

So, in this process, can you suggest to the businesses someone to

tone down the noise and give them the permit after public input? Is there a mechanism to do that, rather than going to the Council for everything? Can the Department work with the businesses and the neighborhood?

MR. LASSUS:

Right. We've attempted to work with this business to correct the situation, but it hasn't come to any--

MR. RAMCHANDRAN:

So you have the mechanism to do that?

MR. LASSUS:

No, we don't have the mechanism. We

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encourage the business to make some changes, but, apparently, that wasn't -That wasn't done.

MR. RAMCHANDRAN:

So the only recourse they have is to go for the public input and go to the Council; go through red-tape requirements.If that is so, can we, in any way, accommodate Ms. Dufrene's request that if a restaurant is located in a commercial area, or the new is coming up, they do not abut any residential area, to, say, 1,000 feet?
Is there a way they don't have to do unnecessary government application process?
Can we include under "Exclusions", Section
(F), "Prohibitions contained in this section

shall not apply to country clubs and restaurants which do not abut 1,000 feet from residential areas"? Is that a way you can accommodate her request?

MR. LASSUS:

That's an option that you could take to make an amendment to this ordinance.

MR. RAMCHANDRAN:

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So, in that case, Mr. Chairman, since I'm a out-and-out pro business person, I like to see minimum red tape in any application process, I make a motion to include under Section (F), "Exclusions", "Prohibitions contained in this section shall not apply to country clubs and restaurants which do not abut residential areas by 1,000 feet". I'd like to make that motion or an amendment to that statement.

CHAIRMAN CHAMPAGNE:

This is to Section 2?

MR. RAMCHANDRAN:

Section (F).

CHAIRMAN CHAMPAGNE:

Section 2 (F).

MR. RAMCHANDRAN:

Yeah, Section 2 (F).

CHAIRMAN CHAMPAGNE:

(F). State it again, please?

MR. RAMCHANDRAN:

"Prohibitions contained in this section shall not apply to country clubs and restaurants which do not abut residential

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areas by 1,000 feet".

CHAIRMAN CHAMPAGNE:

Shouldn't it include barrooms?

MR. RAMCHANDRAN:

No, barrooms are always excluded. It's only restaurants and country clubs. We do not know what is going to come up in the future. I do not like to subject them to unnecessary red tape.

CHAIRMAN CHAMPAGNE:

Do we have a second?

(NO RESPONSE)

Motion dies for lack of a second. Mr. Duhe has the floor.

MR. DUHE:

Thank you, Mr. Chairman. Okay, Mr. Lassus, I'd still like you to explain this time; how that's going to restrict the sound problem, the noise
problem, that they have in that area?

MR. LASSUS:

Well, essentially, when the -when this issue comes before the Council, this particular operation, you could put stipulations on the operation.

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(Addressing Mr. Lewis) Would you like to address it?

MR. LEWIS:

Mr. Duhe, if I may, they're not going to be able to serve alcohol in these places without a permit, so the likelihood that they're going to be having bands, and stuff, out there is greatly reduced. So that's the way you control these alcohol-related events, is by the alcohol. And that's what this ordinance that your committee passed and recommended was designed to do; was control the outdoor drinking. And that's what this is about; is control the outdoor drinking.

CHAIRMAN CHAMPAGNE:

Still Mr. Duhe.

MR. DUHE:

I understand what you're saying, but I think that you're still leaving an opening for someone to have just a little get-together and start up a band; you know, get a band to come there to start playing. It just still doesn't really address the noise problem.

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I understand about the serving alcohol. You don't have to serve alcohol to have a band playing there, you could just have a get-together, and it would create a nuisance. But I thought we could be more specific in addressing this, the noise problem, was my thought. Thank you.

CHAIRMAN CHAMPAGNE:

Mr. Tregre?

MR. TREGRE:

Yes. In response to Mr. Duhe, perhaps we can, and perhaps there may be a whole -But, generally, I think the basic reason for applying this to the barrooms, initially, is the fact you have, number one, have outdoor drinking, then you have outdoor parties that go with the drinking. And things tend to get out of hand, and, you know, we've had volleyball tournaments in some of these places where boom boxes, whatever, have been set up. This particular case, here, at this function, the reception is generally -I'm

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sure there are receptions without alcoholic beverages, but I'll bet

you 90% of them have it. Without that object of alcohol there, you probably won't have the music. But you're right. They could set up a band tomorrow and possibly start playing, and we may have to address this thing further on the sound ordinance. You know, we've worked real long and hard. We got a call from Mr. Long, some time ago, representing the residents of that area. Tried to find a way to get this thing put in place. Far as I'm concerned, you shouldn't be able to have a tent as part of a business place, okay? because there may be some problems with that, okay? But, you know, we have to try to find a way to work this thing out, and if this doesn't work or do the job, we're going to have to do something else, you know? And I think the fact that -The no-fee permit is probably going to be one sheet of paper that you fill out, and the majority of the work and the red tape is going to be done by the Code Enforcement

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people going out there and posting the property. I disagree with the motion that failed, that if you're in a commercial area more than 1,000 feet from residential this wouldn't apply, or you could have certain types of businesses that would be located there. You might could have a ceramic shop, with all your stuff falling off the shelves when the music's blasting. I mean, this thing could affect other commercial establishments, as well, and I think the rule needs to apply for all. We shouldn't show special privilege for this restaurant that's located here, or the one located over there. Let's apply it to all, you know. And I would ask that you support this ordinance. I think it's a step in the right direction. I think it's going to work. But if it doesn't, yes, maybe you'll have a little more work to do.

CHAIRMAN CHAMPAGNE:

Mr. Duhe? Anyone else has--

Mr. Phillips?

MR. PHILLIPS:

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I think this is, really, an evolution to where this is one of the situations where you crawl before you walk, and you take action to do what you can right now to rectify some of the situations that are out there. The 500-feet situation is, if I remember right and I'm correct, I believe that's one of the rules that are in the State alcohol permit application, in which if you're a church or if you're a school, you're not allowed to have barrooms, for instance, within 500 feet. So this, really, stays consistent with that. It just happens to be right now that you can't have a barroom within 500 feet of a church or school, but you can have one right now within 500 feet of a neighborhood. And this makes everything consistent, you know, if that helps to explain it.

CHAIRMAN CHAMPAGNE:

Mr. Johnson?

MR. JOHNSON:

Yes. Yeah, let's clarify something. On the 500 feet, the Parish did that before

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the State, because the State was 300. And the Parish did it back then and it was 500, which is all okay. But what I want to ask is not necessarily against this, but the whole deal is noise. Now, if you remember, we'd been trying to get a noise ordinance for a long time, and we finally got one. Why does that -Why is it that that doesn't work, does anybody know?

MR. LEWIS:

The reason it doesn't work is the noise ordinance that we have is very specific to the various -the location. And then the one we passed, it was, like, the State law that just got passed that is location specific, too, it applies to automobiles. So we're going to get around, I think maybe, Mr. Johnson, to a noise ordinance that will work in these instances, but as I told you before, they have to be very carefully tailored or they're found unconstitutional.

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So I think we crafted the one for the parks very carefully, very narrowly, and it will work, and I think, with some, that it may be close on this other one like the State has passed, but I think that one will eventually work, too. But one that would work in this instance would have to be crafted totally different. It would have to be what I would call a, or refer to as a property line noise ordinance, and would have to have some different enforcement provisions. And I could show you some that's been done, for instance, say, in New Jersey, or in places like that, but that haven't - that they have -they have very detailed instructions on how to enforce it, and the officers have to have these decibel counters, and those kinds of things. So I -We -The Sheriff's Office is not really crazy about getting into the decibel-counting business and that kind of thing, so we have to work around that

somehow, but we are still considering it.

MR. JOHNSON:

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Well, I hope you would. Now--

MR. LEWIS:

Now, I understand your--

MR. JOHNSON:

Right.

MR. LEWIS:

- trepidation about this. This is not, as Mr. Phillips said, a cure-all for it, but this is a step in the right direction. I don't know if you remember, but when this was -origi :ally came up, this ordinance here, I was against these exceptions, and this is one of the reasons that I was against these exceptions, because I felt like it would eventually lead to this problem. And it has, and now we're taking a step to correct part of the problem. I don't think the country clubs pose that kind of problem, because people move into areas with country clubs and they expect that kind of activity. I don't think the same can be true of restaurants and barrooms.

MR. JOHNSON:

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My only other--

CHAIRMAN CHAMPAGNE:

Mr. Johnson, your time's up. Any other Council discussion?

Mr. Duhe? Well, I'm sorry,

Mr. Alexander. First time.

MR. ALEXANDER:

Thank you, Mr. Chairman. If we approve this ordinance, we would remove restaurants from the exclusions. Would a restaurant then have to apply for an exception?

MR. LEWIS:

Correct.

MR. ALEXANDER:

Okay, and what happens in this exception process if the restaurant is given an exception, and then what recourse do the people have if they to challenge that exception?

MR. LEWIS:

I don't think that once the process is followed, and the Council, or, in fact, if the Council grants them an exception--

MR. ALEXANDER:

No, no, no, no, no, the exception is granted by--

CHAIRMAN CHAMPAGNE:

By the director, yeah.

MR. ALEXANDER:

- Planning and Zoning.

CHAIRMAN CHAMPAGNE:

The Council only takes it up if it has objection.
MR. LASSUS:

The permit would be granted by either the Planning and Zoning director, or through the Council. It would be a permit. So once they get the permit, they're--

MR. ALEXANDER:

Okay, if you -If you give them the exception, if you grant, let's say, this particular establishment an exception, what recourse do the people have now, if they're still annoyed?

MR. LASSUS:

If the Planning director grants, they could appeal according to this provision.

MR. ALEXANDER:

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Okay, I thought that this provision only said that if the exception was denied then the restaurant could appeal.

MR. LASSUS:

Yeah, if it's de -I thought that's what you meant.

MR. ALEXANDER:

Not the restaurant, I'm talking about the neighbors. What if you give them an exception to a restaurant and the neighbors are unhappy, what recourse do the neighbors have?

MR. LASSUS:

Well, they to notify us during the posting.

MR. ALEXANDER:

What if they don't? What if they don't?

MR. LASSUS:

Well, then, it's permitted. They've had their opportunity, according to the code, to make an appeal or to make comment, and they need to take that opportunity, at that time, to do that.

MR. ALEXANDER:

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M'mm-h'mm. That's all I have.

CHAIRMAN CHAMPAGNE:

Anyone else wishing to speak, first time?
Mr. Duhe, again.

MR. DUHE:

Yeah, Mr. Lewis, one quick question. Wouldn't that reception activity be considered disturbing the peace, and couldn't the Sheriff's Office act on that?

MR. LEWIS:

It may be.

MR. DUHE:

Okay, and also--

MR. LEWIS:

Not necessarily. It may be, though.

MR. DUHE:

How would it affect swim clubs that have little pool parties? Not country club, just swim clubs. Would that affect them?

MR. LEWIS:

It might affect them if they're drinking alcohol, but they could apply for a permit, also.

MR. DUHE:

Okay.

MR. JOHNSON:

It only says "barrooms". The exception says--

MR. LEWIS:

The only one that's prohibited is barrooms.

CHAIRMAN CHAMPAGNE:

Mr. Johnson, you had something else?

(NO RESPONSE)

Anyone else wishing to comment?

Council discussion?

(NO RESPONSE)

Please cast your votes.

(COUNCIL VOTES)

CHAIRMAN CHAMPAGNE:
The Summary 4405 carries.

Mr. Ramchandran, Mr. Johnson, Mr. Alexander, Mr. Phillips, Mr. Duhe, Mr. Minnich voting yes. Mr Authement is absent. Mr. Sirmon, I didn't cast your vote.

MR. SIRMON:

My brother own The Cajuns, so I'm abstaining from the vote.

CHAIRMAN CHAMPAGNE:

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And I am, also, abstaining because I own a restaurant, but it's really not affected by this.

* * *